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QUESTIONS PRESENTED

1. Whether the admission of "victim impact" evidence in the sentencing phase of a capital murder trial violates the Eighth and Fourteenth Amendments.

2. Whether *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), should be overruled.

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**BRIEF OF THE WASHINGTON LEGAL
FOUNDATION, MARY AND JOSEPH ZVOLANEK,
FAMILIES AND FRIENDS OF MISSING PERSONS
AND VIOLENT CRIME VICTIMS, THE NATIONAL
VICTIM CENTER, PARENTS OF MURDERED
CHILDREN, PEOPLE AGAINST CHILD ABUSE,
INC. AND THE STEPHANIE ROPER COMMITTEE,
INC. AS AMICI CURIAE IN SUPPORT OF
RESPONDENT**

INTERESTS OF AMICI CURIAE

The *amici* are individuals and organizations concerned with promoting victims' rights in the criminal justice system. Included among the *amici* are Mary and Joseph Zvolanek, the parents of Charisse Christopher and the grandparents of Lacie Christopher, the two individuals whom Petitioner Pervis Payne was convicted of murdering. The Zvolaneks now have custody of Nicholas Christopher, Charisse Christopher's sole surviving child who was three years old at the time of the murders. Mary Zvolanek testified at the sentencing phase of Petitioner's trial regarding the harm inflicted on Nicholas due to the deaths of his mother and sister. Petitioner has asked this Court to hold that the admission into evidence of Mary Zvolanek's testimony violated his constitutional rights. A further description of the organizational *amici* is set forth in the Appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court has granted certiorari to consider whether its judicially-imposed prohibition on the use of victim impact evidence in the sentencing phase of a capital murder case should be overruled. This question is presented in a case where the petitioner killed both Charisse Christopher and her two year old daughter Lacie

by repeatedly stabbing them with a butcher knife. During this attack, petitioner also repeatedly stabbed Ms. Christopher's three year old son, Nicholas, who apparently witnessed the attack on his mother and sister and survived despite knife wounds that went entirely through his body. *State v. Payne*, 791 S.W.2d 10, 12 (Tenn. 1990).

With that as the backdrop, the Supreme Court now finds itself considering whether it was *prejudicial error of constitutional dimension* for the jury sentencing the perpetrator of this brutal multiple murder to hear the prosecutor comment on the good character of the young mother and her children and the extent of their suffering. Even more alarming, the Court's prior decisions on the use of victim impact evidence also compel it to consider whether it was constitutionally impermissible to allow Nicholas Christopher's grandmother to testify briefly about how her little grandson cries for his dead mother and sister. See *Payne*, 791 S.W.2d at 17-18. These questions are before the Court as constitutional issues only because of the Court's flawed jurisprudence of the Punishments Clause of the Eighth Amendment, culminating in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989).

Booth and *Gathers* are capstones to a series of decisions by this Court without foundation in either the Punishments Clause or any other enduring constitutional principle, and which constitute an unbridled usurpation of legislative power. The Supreme Court of Tennessee expressed its assessment of *Booth* and *Gathers* in blunt but eloquent terms:

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to

relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

State v. Payne, 791 S.W.2d at 19. Yet that is where the tortuous path of this Court's Eighth Amendment jurisprudence has led it.

Such juridical meandering should have been avoided. In his opinion for the Court in *McGautha v. California*, Justice Harlan warned that it would be impossible to solve "the intractable . . . problem of 'standards' which the history of capital punishment has from the beginning reflected." 402 U.S. 183, 207 (1971). In the jurisprudence developed in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), the Court has attempted this impossible task, based in large measure on the erroneous assumption that the Punishments Clause of the Eighth Amendment incorporates "the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion), quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

If the Court persists in its present approach, it will find itself repeatedly inventing constitutional distinctions, judicially woven into the fabric of the Punishments Clause, between the minutiae of evidentiary and procedural rules presented on review of capital sentencing proceedings. Instead, the Court should belatedly heed its own warning that "[c]aution is necessary lest this Court become, 'under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.'" *Gregg*, 428 U.S. at 176 (plurality opinion), quoting *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion).

Alternatively, *Booth* and *Gathers* should be overruled because they were wrongly decided even in the context

of the Court's earlier decisions construing the Punishments Clause. There is no general constitutional objection to a victim's participation in criminal sentencing proceedings. Furthermore, such participation would serve important social purposes emphasized by the Court in its earlier opinions. The full measure of the murderer's responsibility for his crime necessarily includes the real harm caused to the victim and her family, not merely an abstract assessment of *mens rea*. Given the virtually unlimited range of mitigation evidence that may be offered by the defendant, the sentencing jury should also be fully apprised of the human suffering that results from the criminal's murderous act.

ARGUMENT

I. *BOOTH AND GATHERS SHOULD BE OVER- RULED BECAUSE THEY REPRESENT THE APOTHEOSIS OF A FLAWED JURISPRUDENCE OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE.*

A. *The Punishments Clause Was Originally Understood Solely As a Prohibition of Torture and Other Barbarous Punishments.*

The language of the Punishments Clause originated in the English Bill of Rights of 1689, which provided: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This provision was incorporated verbatim into the Virginia Declaration of Rights by George Mason in 1776, and shortly thereafter found its way into the constitutions of eight other states and the Northwest Ordinance of 1787. With a minor change in wording

("shall not be" instead of "ought not to be"), it was adopted in 1791 as the Eighth Amendment.¹

There has been debate as to the purpose of the language about cruel and unusual punishments in the English Bill of Rights. This language was traditionally thought to have been adopted in response to the harsh punishments meted out by Lord Justice Jeffreys in the "Bloody Assize." Modern scholarship indicates that the language more likely refers to punishments inflicted upon Titus Oates for giving perjured testimony leading to the erroneous execution of a number of supposed participants in the infamous "Popish Plot" of 1678-79.² "In the context of the Oates case, 'cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose."³

The debate over the meaning of this language in the English Bill of Rights has become significant because all available evidence indicates that the American framers of the Punishments Clause intended it solely as a prohibition of torture and other barbarous punishments.⁴ Throughout the Nineteenth Century this Court and commentators have treated the Punishments Clause as applying to methods of punishment involving "torture or a lingering death," such as burning at the stake, crucifixion or breaking on the

¹*Furman v. Georgia*, 408 U.S. 238, 319 (Marshall, J., concurring); Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 Calif. L. Rev. 839, 839-40 (1969).

²*Furman v. Georgia*, 408 U.S. at 317-18 (Marshall, J., concurring); Granucci, *supra* note 1, at 852-59; see R. Berger, *Death Penalties: The Supreme Court's Obstacle Course* 35-40 (1982).

³Granucci, *supra* note 1, at 859.

⁴*Furman v. Georgia*, 408 U.S. at 319-21 (Marshall, J., concurring); Granucci, *supra* note 1, at 840-44. Granucci attributes this American understanding to a misreading of English legal history. *Id.* at 860-65.

wheel.³ The clause was not thought to authorize judicial review of the proportionality of a punishment to the offense.

In recent years, the circumstances giving rise to this provision in the English Bill of Rights have been invoked to justify a broader conception of the Punishments Clause than the understanding of the American framers.⁴ This approach is unwarranted for two reasons.

First, the only relevant original meaning is that given the clause by the people who framed and ratified it in 1791. If the English used the words in a different sense in 1689, and that meaning was unknown in America in 1791, then it can hardly bear on the original meaning of the Eighth Amendment. And the authorities are generally in agreement that the American framers understood the clause to prohibit inherently cruel methods of punishment and not those that were disproportionate to the offense.⁵

Second, it exaggerates the history of the English clause to say that it reflects an understanding that a punishment must be proportioned to the severity of the crime. The concern in *Titus Oates*' case seems to have been that the punishments were unauthorized by statute or custom. At a time when petty theft was a capital offense, it strains credibility to believe that the English thought *Oates*' punishments disproportionately severe for a perjurer whose testimony had caused fifteen innocent men to be executed. And, in fact, *Oates*' sentence --

³*In re Kemmler*, 136 U.S. 436, 446-47 (1890); see *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879), and commentators cited therein.

⁴*Solem v. Helm*, 463 U.S. 277, 284-86 (1983); *Rummel v. Estelle*, 445 U.S. 263, 288 (1980); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 318 (1972) (Marshall, J., concurring).

⁵*Granucci*, *supra* note 1, at 843-44; R. Berger, *supra* note 2, at 43-45; see *Solem v. Helm*, 463 U.S. at 313 n.6 (Burger, C.J., dissenting).

while criticized in some quarters -- was upheld by the House of Lords a few months after the promulgation of the Declaration of Rights.⁶

In any event, America's Bill of Rights, as adopted, clearly contemplated the lawful imposition of capital punishment in the language of the Fifth Amendment,⁷ and the death penalty has been part of federal and state criminal law since the beginning of the Republic. Likewise, the Fourteenth Amendment, ratified in 1868, explicitly refers to the death penalty.¹⁰ Whatever original meaning is attributed to the Punishments Clause, it certainly cannot prohibit the lawful imposition of capital punishment.

B. In this Century, the Court Has Improperly Substituted Ideology for History in its Interpretation of the Punishments Clause.

The historical approach to the Punishments Clause was abandoned when the Court began to apply a theory of progressive societal enlightenment as the basis of its jurisprudence.

In *Weems v. United States*,¹¹ the Court expanded the meaning of the Punishments Clause beyond a limitation on the *methods* of punishment to include a review of the

⁶R. Berger, *supra* note 2, at 37-40.

⁷"No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of life . . . without due process of law" U.S. Const. amend. V (emphasis added).

¹⁰" . . . nor shall any State deprive any person of life . . . without due process of law" U.S. Const. amend. XIV, § 1.

¹¹217 U.S. 349 (1910).

proportionality of the punishment to the crime. Weems received a sentence of *cadena temporal* for the offense of making a false entry in a government account book.¹² Although the Court indicated that aspects of the sentence were inherently cruel, it also held that the sentence was invalid because it was disproportionately severe.¹³

Justice McKenna's opinion in *Weems* contains a well-known discussion of the doctrine of a living constitution.¹⁴ He concluded that the Punishments Clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378 (citations omitted). The *Harvard Law Review* praised the decision in *Weems* as "a triumph of enlightenment over history."¹⁵

This theory of progressive enlightenment was again invoked in *Trop v. Dulles*,¹⁶ which invalidated denationalization as a statutory sanction for desertion from the

¹²This punishment, imposed in the Territory of the Philippines, included twelve years of "hard and painful labor" in chains, as well as accessory penalties including lifetime surveillance by government authorities. 217 U.S. at 364-66.

¹³217 U.S. at 377. Justice White's dissenting opinion in *Weems*, joined by Justice Holmes, vigorously disputes the notion that the Punishments Clause authorizes courts to review the proportionality of criminal sentences. 217 U.S. at 382. The practical effect of the holding in *Weems* was limited by *Badders v. United States*, 240 U.S. 391 (1916) (Holmes, J.), in which the Court eschewed a role in the case-by-case review of the proportionality of sentences to crimes.

¹⁴"Time works changes, [and] brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." 217 U.S. at 373. See also *id.* at 373-75.

¹⁵Note, *What is Cruel and Unusual Punishment*, 24 Harv. L. Rev. 54 (1910), cited in Granucci, *supra* note 1, at 843.

¹⁶356 U.S. 86 (1958).

armed forces in wartime. Chief Justice Warren's plurality opinion cited *Weems* for the proposition that the Eighth Amendment was not "static" in scope, *id.* at 101, and concluded that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* The decision in *Trop* did not involve the issue of proportionality review, but rather whether denationalization is an inherently unconstitutional method of punishment.¹⁷ The plurality opinion concluded that it was, because it resulted in "the total destruction of the individual's status in organized society." *Id.*

The doctrine that the Punishments Clause encompasses proportionality review, although weak in historical support, has some textual logic. It appears as part of an amendment that bars "excessive bail" and "excessive fines."¹⁸ However, the rationale stated in *Weems* and *Trop* -- that the Punishments Clause must be interpreted to reflect the evolving decency of human society -- is extraconstitutional in origin. It derives from doctrines of

¹⁷The opinion acknowledged that "[s]ince wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." 356 U.S. at 99. The opinion also stated that the death penalty "cannot be said to violate the constitutional concept of cruelty." *Id.*

¹⁸See *Furman v. Georgia*, 408 U.S. at 403 (Marshall, J., concurring); *O'Neil v. Vermont*, 144 U.S. 323, 340 (Field, J., dissenting) ("The whole inhibition [of the Eighth Amendment] is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.") There is also some historical support for a concept of proportionality in the common law of England, although this concept is not clearly tied to the adoption of the Punishments Clause as part of the Eighth Amendment. See Granucci, *supra*, note 1, at 844-47. But see R. Berger, *supra*, note 2, at 30-35. The opinion of this Court in *Solem v. Helm* justifies proportionality review solely on the basis of historical and textual analysis. 463 U.S. at 284-90.

cultural evolution that were particularly fashionable in the Nineteenth and early Twentieth Centuries.

In an influential book first published in 1920, *The Idea of Progress*, Professor J.B. Bury surveyed the intellectual history of this concept. He defined the idea of Progress as "based on an interpretation of history which regards men as slowly advancing -- *pedetentim progredientes* -- in a definite and desirable direction, and infers that this progress will continue indefinitely."¹⁹ Through doctrines such as Positivism,²⁰ Marxism and Social Darwinism,²¹ the idea of Progress permeated the political philosophy of the time.

It is not surprising for a Court that embraced Spencer's economic doctrines in such decisions as *Lochner v. New York* also to embrace in *Weems* his doc-

¹⁹J.B. Bury, *The Idea of Progress* 5 (1932 ed.). See also Pineda, "Civilization and Cultural Evolution," 4 *Encyclopedia Britannica* 657-60 (15th ed. 1982).

²⁰Comte, for example, believed that mankind had progressed through theological and metaphysical periods to a third or Positive period, which will feature "the organization of society by means of scientific sociology." This period will be controlled by "savants who will direct social life not by theological fictions but by the positive truths of science." J.B. Bury, *supra* note 19, at 299-300. Comte is regarded as the "father" of sociology.

²¹Herbert Spencer's *Social Statics* reflects the view that principles of biological evolution apply in the moral sphere as well. Spencer "begins by arguing that the constancy of human nature, so frequently alleged, is a fallacy. For change is the law of all things." He thus concludes that "perfectibility is possible." Next, he argues that "evil is not a permanent necessity. For all evil results from the non-adaptation of the organism to its conditions: this is true of everything that lives. And it is equally true that evil perpetually tends to disappear." J.B. Bury, *supra* note 19, at 337.

trine of moral evolution.²² What is surprising, however, is that a modern Court, having seen the wars and holocausts of our century, could continue to base constitutional doctrine on the supposition that a maturing society will necessarily enjoy "evolving standards of decency."²³

We do not ask the Court to decide whether the doctrines of Comte, Marx and Spencer are right or wrong; our point is that the Framers did not embody such ideological considerations in the Punishments Clause. It is certainly appropriate for legislators to be influenced by ideological considerations. For judges, reliance on extraconstitutional ideologies should be anathema.²⁴ Justice Story expressed his disdain for such judicial manipulation of the Constitution over one hundred and fifty years ago:

²²Justice Holmes, who joined the dissenting opinion in *Weems*, made the well-known remark in his *Lochner* dissent that the Constitution "does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

²³See P. Johnson, *Modern Times: The World From the Twenties to the Eighties* 731 (1983):

Darwin himself always stressed the limits of his discoveries. He discouraged those who sought to build ambitious projections on them. That was why he gave no license to the theories of the 'Social Darwinists,' which terminated in Hitler's holocaust, and why he likewise brushed off Marx's attempts to appropriate Darwinism for his own theories of social determinism, which eventually produced the mass murders of Stalin, Mao Tse-tung and Pol Pot.

²⁴This was the general point of Alexander Bickel's 1969 Oliver Wendell Holmes lectures, published as A. Bickel, *The Supreme Court and the Idea of Progress* (1970).

I have not the ambition . . . of enlarging or narrowing its powers by ingenious subtleties and learned doubts. . . . Upon subjects of government it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common sense of the people; and never was designed for trials of logical skill, or visionary speculation.²⁵

Nonetheless, our opposition to the visionary "evolving standards of decency" jurisprudence does not mean that the Court should ignore changing circumstances. Although some authorities have advocated a strictly historical approach to this clause,²⁶ technological changes may render methods of punishment "cruel and unusual" today

²⁵J. Story, *Commentaries on the Constitution of the United States* vi (Carolina Academic Press ed. 1987).

The Court's carefully crafted historical jurisprudence of the Excessive Fines Clause of the Eighth Amendment set forth in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), stands in ironic juxtaposition to its ideological jurisprudence of the Punishments Clause. In holding that the Excessive Fines Clause does not apply to punitive damage awards in civil cases, the Court emphasized that "[t]o hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history." 109 S. Ct. at 2914 (emphasis added).

²⁶See *McGautha v. California*, 402 U.S. 183, 225 (1971) (Black, J., concurring) ("As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment . . . was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights."). Justice Holmes also supported that view, joining Justice White's dissent in *Weems v. United States*, 217 U.S. 349, 409-11, 413 (1910).

that were not so in 1791.²⁷ However, this would not be because the old values in the Constitution have evolved into new and better values, but because the same unchanging values are applied in a different factual situation.

C. Disregarding Justice Harlan's Warning in *McGautha*, the Court Has Used the Clause to Erect an Illegitimate Edifice of Constitutional Doctrine for Regulating Capital Punishment.

Just over a year before its *Furman* decision, the Court decided whether a jury could constitutionally impose the death penalty in a murder case without governing standards to guide its exercise of discretion. *McGautha v. California*, 402 U.S. 183 (1971). Justice Harlan, writing for the Court, emphasized the constitutional principles that should guide the exercise of judicial power in review of such cases:

Our function is not to impose on the States, ex cathedra, what might seem to us a better system for dealing with capital cases. . . . [T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this

²⁷For example, the availability of lethal injections might make execution by hanging a cruel and unusual method of punishment in today's society. Opponents of capital punishment have taken varying positions regarding lethal injection. See G. Smith, *Capital Punishment 1986: Last Lines of Defense* 28-33 (1986). Cf. *Heckler v. Chaney*, 470 U.S. 821 (1985) (rejecting argument that Food & Drug Administration should be compelled to ensure that drugs used for execution by lethal injection are "safe and effective").

Court. The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected.

Id. at 195, 221 (citations omitted).

Thirteen months later this sound constitutional approach to capital sentencing procedure was cast aside for an Eighth Amendment analysis that confused courts and legislatures and led to continued misapplication of the Eighth Amendment in subsequent cases.

The majority's *per curiam* decision in *Furman* held that the imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment, as applied to the states through the Fourteenth Amendment. 408 U.S. at 239. Each of the five separate concurring opinions arrived at the same result by different routes.

Within four years of the *Furman* decision, at least thirty-five states had reacted by enacting new death penalty statutes. In upholding a new Georgia statute in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court acknowledged that the "standards of decency" argument asserted in *Furman* had been substantially undercut by this flurry of legislative activity. *Id.* at 179 (plurality opinion). But, having concluded that the death penalty was not unconstitutional *per se*, *id.* at 187 (plurality opinion), the Court persisted in using the Eighth Amendment to prescribe in great detail the procedures to be followed in capital punishment cases.

In two lines of cases decided after *Furman*, the Court has undermined the concern expressed in some of the concurring opinions about the excessive discretion that characterized the death penalty statutes that were declared unconstitutional. The effect of these cases is to give a

jury the unbridled discretion to withhold imposition of the death penalty in any case.²⁸

One of these lines of cases precludes the states from defining any category of crime, no matter how serious, for which the death penalty is mandatory. The Court began by holding that a mandatory death penalty for first-degree murder was a cruel and unusual punishment because it violated "contemporary standards regarding the infliction of punishment." *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion); *accord*, *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). The Court continued by holding unconstitutional a statute imposing a mandatory death penalty for the first-degree murder of a police officer engaged in the performance of his duty. *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (*per curiam*). Finally, the Court held that a mandatory death penalty could not be imposed for first-degree murder committed by an inmate serving a life term sentence. *Sumner v. Shuman*, 483 U.S. 66 (1987).²⁹

The other line of cases requires state courts to permit jurors unlimited discretion to consider mitigating circum-

²⁸This approach has been aptly characterized as constituting an "about-face since *Furman*," which has the Court going "from pillar to post" in search of theories to invalidate the imposition of capital punishment. *Lockett v. Ohio*, 438 U.S. 586, 622 (White, J., concurring and dissenting in part, and concurring in the judgment); *id.* at 629 (Rehnquist, J., dissenting).

²⁹More recently, in *Blystone v. Pennsylvania*, 110 S. Ct. 1078 (1990), the Court upheld a capital sentencing procedure that required imposition of the death sentence if the jury found at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously found one or more aggravating circumstances which outweighed any mitigating circumstances. This was not "impermissibly 'mandatory' as that term was understood in *Woodson* or *Roberts*," since "[d]eath is not automatically imposed upon conviction for certain types of murder." 110 S. Ct. at 1082. The Court noted that petitioner Blystone's reliance on *Sumner v. Shuman* was "misplaced." *Id.* at 1083 n.5.

stances at the sentencing phase. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the plurality opinion condemned any limitations on the defendant's proffer of matters in extenuation or mitigation. The Court indicated that its ruling did not limit "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604 n.12. However, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court retreated from this indication that mitigating evidence could be scrutinized for relevance.³⁰ In like manner, the Court also condemned a capital sentencing procedure that allowed the jury to consider only those mitigating factors it found unanimously when weighing them against the aggravating factors justifying the death penalty. *McKoy v. North Carolina*, 110 S. Ct. 1227 (1990). The Court concluded that this unanimity requirement impermissibly limited jurors' consideration of mitigating circumstances, irrespective of the fact that the jury was not required to impose a death sentence even if it unanimously found aggravating factors and no mitigating factors. *Id.*

These two related lines of cases are squarely based upon the "evolving standards of decency" approach to the Punishments Clause.³¹ Under this approach, the Court has held that the penological theory of discretionary sentencing represents the enlightened view of society and thus is constitutionally mandated in capital cases.

³⁰There, the Court vacated a death sentence because the trial court, apparently on grounds of relevance, refused to consider certain evidence presented by the defendant. This included testimony that he had been raised without proper guidance, that his mother had been an alcoholic and possibly a prostitute, that he had been subject to physical punishment as a child, and that he was emotionally disturbed. 455 U.S. at 107.

³¹In *Woodson*, for example, the plurality opinion repeatedly cites to the plurality opinion in *Trop v. Dulles*. 428 U.S. at 288, 301, 304.

In *Woodson*, the plurality opinion explained this rationale as follows:

Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment [requires this approach].

428 U.S. at 304 (citations omitted).³²

The same rationale is also found in the *Lockett* plurality opinion, which observes at one point: "Most would agree that 'the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process.'" 438 U.S. at 603, quoting *Furman v. Georgia*, 408 U.S. at 402 (Burger, C.J., dissenting). The opinion recognizes that the prevalent "public policy" of sentencing discretion is the product of legislative choice rather than constitutional mandate. However, the opinion concludes that the same "considerations that account for the wide acceptance of individualization of sentences in noncapital cases" justify requiring it as a matter of constitutional law in capital cases. 438 U.S. at 605. This is yet another transparent attempt to cloak the usurpation of legislative prerogatives in the garb of constitutional principle. "Description, even approval, of the prevailing mood of penal philosophy . . .

³²In *Roberts (Stanislaus)*, the plurality opinion elaborated on this rationale by adverting to "our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" 428 U.S. at 333, quoting *Williams v. New York*, 337 U.S. 241, 247 (1949).

is one thing; its elevation to constitutional dogma is quite another."³³

The opinions of the Court in later cases such as *Roberts (Harry)*, *Sumner v. Shuman*, *Eddings*, and *McKoy* simply adopt without much elaboration the rationale of the plurality opinions in *Woodson* and *Lockett*.

We have already explained why the progressive enlightenment theory of *Weems* and *Trop* is an illegitimate basis for interpreting the Punishments Clause. It is important to recognize that in *Woodson*, *Lockett* and their progeny the Court went well beyond the holding of *Weems* regarding proportional punishment. Today, we are told that enlightened social theory requires punishment to be proportional, not to the *crime*, but to the *criminal*.

Moreover, if the meaning of the Eighth Amendment reflects changes in social theory, then the rationale of *Woodson* and *Lockett* is simply out of date. The evolution of sentencing theory and practice now strongly supports mandatory sentencing as the more enlightened policy.³⁴ Thus, even if one applies this evolutionary approach to the Eighth Amendment, it provides no

³³Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1078 n.21 (1964).

³⁴See S. Kadish & S. Schulhofer, *Criminal Law and its Processes* 131-36 (5th ed. 1989) (materials on the determinate sentence reform movement); K. Starr, "The Impetus for Sentencing Reform in the Criminal Justice System," in *Crime and Punishment in Modern America* 299-312 (P. McGuigan & J. Pascale, eds., 1986); Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1940-44 (1988); Lowe, *Modern Sentencing Reform: A Preliminary Analysis of the Proposed Federal Sentencing Guidelines*, 25 Am. Crim. L. Rev. 1 (1987). Congress adopted the policy of mandatory sentencing guidelines for all federal courts in the Sentencing Reform Act, part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

support for invalidating a mandatory death penalty for first-degree murder.

In reality, the Court's invocation of social theory in support of constitutional adjudication is jurisprudential sophistry. A slender majority of the Court has laid a procedural minefield to cripple federal and state efforts in carrying out the mandate of the electorate that certain heinous crimes, like the premeditated murder of a police officer engaged in the performance of duty, should be punished by death.

D. The Court's Illegitimate Jurisprudence of the Punishments Clause Has Culminated in the Holdings of *Booth* and *Gathers* that Victim Impact Evidence Cannot Be Considered In Capital Sentencing.

In *Booth v. Maryland*, the Court applied its Punishments Clause jurisprudence to the use of a victim impact statement in the sentencing phase of a capital trial. The Court held it was unconstitutional for the jury to consider information about the character of the victim, the impact of the crime on the victim's family, and their sentiments about the crime. 482 U.S. at 503-09. The Court went further in *South Carolina v. Gathers*, condemning prosecutorial comment on evidence relating solely to the character of the victim even though that evidence had already been admitted in the guilt phase of the trial without defense objection. 490 U.S. at 811-12. The majority opinion in *Gathers* would prevent the jury from catching even a "glimpse of the life" the murderer "chose to extinguish." *Id.* at 816 (O'Connor, J., dissenting, quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

We will argue in part II *infra* that *Booth* and *Gathers* are incorrect for reasons unrelated to our criticisms of the Court's recent jurisprudence of the Punishments Clause.

First, however, we examine how *Booth* and *Gathers* are the products of that flawed jurisprudence.

Of course, both decisions continue the Court's effort to build a set of procedural requirements for the death penalty under the Punishments Clause that is entirely separate from any analysis under the Due Process Clause as in *McGautha*. Indeed, the Court in *Booth* carefully stated that its opinion carried no implication concerning the use of victim impact evidence in non-capital cases. 482 U.S. at 509 n.12.

Booth and *Gathers* are also rooted in the view that evolving standards of decency require capital punishment to reflect an "individualized determination" based upon each defendant's unique situation. *Booth* at 502, quoting *Zant v. Stephens*, 462 U.S. at 879; accord *Gathers* at 810: "For purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and moral guilt," quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982). This, of course, reflects the once-fashionable theory that rejected mandatory sentencing for a discretionary and individualized approach.

At bottom, however, *Booth* and *Gathers* reflect a view that evolving standards of decency require a utilitarian approach to punishment. This is not expressly stated in the opinions, but becomes clear upon examining their antecedents and effects.

A basic value of victim impact evidence is to satisfy the need of the victim (including in a murder case the victim's family) to seek retribution for a grievous loss. A sentencing procedure that permits victims to have input into the sentencing process obviously satisfies this purpose more effectively than one in which their voices are excluded. *Booth* and *Gathers* treat such input from or about victims as irrelevant to any proper sentencing considerations. *Gathers*, 490 U.S. at 811-12; *Booth*, 482 U.S. at 504.

Why is the victim's desire for retribution irrelevant? Some members of the Court have indicated that evolving standards of decency have brought us to a point where retribution is no longer a proper goal of criminal punishment. Justice Marshall's concurring opinion in *Furman* states in part:

Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance. 408 U.S. at 343 (citations and footnote omitted). See also *id.* at 387 (Brennan, J., concurring).

Here, again, one wonders what constitutional source justifies the rejection of a retributionist theory of punishment for a utilitarian approach. In fact, both retributionist and utilitarian theories of punishment were known at the time the Eighth Amendment was adopted.³⁵ Since then, the relative popularity of the theories has varied from time to time.³⁶ In his lecture on the criminal law first published in 1881, Oliver Wendell Holmes observed:

It certainly may be argued, with some force, that is has never ceased to be one object of punishment to satisfy the desire for vengeance

The statement may be made stronger still, and it may be said, not only that the law does, but that it ought to, make the gratification of revenge an object. This is the opinion, at any rate, of two authorities so great, and so opposed in their other views, as Bishop

³⁵See Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 845-53 (1972).

³⁶See W. Berns, *For Capital Punishment* 41-82, 128-52 (1979) (discussing the rise and fall of rehabilitative, deterrent and retributionist theories of punishment since the Eighteenth Century).

Butler and Jeremy Bentham. Sir James Stephen says, "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."³⁷

Holmes went on to indicate that the criminal justice system could appropriately reflect in various ways all of the theories of punishment. Our point in presenting this discussion is that we have no reason to assume that the Framers meant to incorporate one theory rather than the other into the Punishments Clause. It follows that nothing in the Constitution legitimizes the Court's imposition of one theory or the other on the American electorate.

However, if a "living Constitution" embodies the latest trend in evolving social theory, then the Court's current insistence upon a utilitarian approach to punishment is already out of date. In recent years, there has been a great change in penological thought. The utilitarian theories have been at least partially discredited, and the retributionist theory is now quite popular. One commentator has summarized this trend as follows:

In the modern era, judicial sentencing philosophy had changed radically; rather than requiring that the punishment fit the crime, judges adopted the view that the punishment should fit the offender. During the 1950's, the predominant judicial philosophy of punishment, as well as the prevailing view of penologists favored the concepts of deterrence and rehabilitation over the concepts of retribution and incapacitation. More recently, however, the emphasis has shifted again; both judges and penologists have expressed considerable skepticism about the value of rehabilitation. Support is growing in the courts and

³⁷O.W. Holmes, *The Common Law* 40, 41 (1923 ed.).

Congress for a crime control model of punishment based primarily upon retribution and incapacitation.³⁸

A court whose jurisprudence of the Punishments Clause requires it to reflect "evolving standards of decency" cannot today claim that considerations of retribution must be excluded from the capital sentencing process. Consequently, the Court's vision of a protean Eighth Amendment has already rendered its judgments in *Booth* and *Gathers* obsolete.

II. ALTERNATIVELY, *BOOTH* AND *GATHERS* SHOULD BE OVERRULED BECAUSE THEY ARE ERRONEOUS EVEN IN THE CONTEXT OF THE COURT'S OTHER DECISIONS UNDER THE PUNISHMENTS CLAUSE.

A. There is No General Constitutional Impediment to According a Victim Standing to Participate in the Criminal Process, Including Sentencing.

It is a legal fiction of comparatively recent origin that only the state has an interest in the prosecution of crimes. In England prior to the Nineteenth Century, criminal prosecution was primarily the responsibility of the victim. Public prosecutors were actually more common in the colonies at the time of the American Revolution. Still, private prosecution was accepted in the United States at the time the Eighth Amendment was

³⁸Ogletree, *supra* note 34, at 1940-41 (footnotes omitted). See also W. LaFare & A. Scott, *Criminal Law* 26-29 (2d ed. 1986); Gardner, *The Renaissance of Retribution -- An Examination of Doing Justice*, 1976 Wis. L. Rev. 781 (1976).

adopted and for some years thereafter.³⁹ In light of this history, it would be hard to say that the Framers thought that victim participation in criminal prosecution raised a constitutional doubt. Nor can it be said that the move to public prosecution reflected a desire to eliminate any role for the victim.⁴⁰

Even today, private prosecution of crimes is permitted in a number of states. Although the propriety of allowing a victim to control the prosecution of a crime has been called into question, the point is a debatable one.⁴¹ The existence of a close debate on victim control of prosecution suggests that more limited victim participation in the nature of an impact statement should not be constitutionally questionable.⁴²

³⁹See Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 *Pepperdine L. Rev.* 117, 125-32 (1984); Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 *Harv. J.L. & Pub. Pol'y* 357, 359-72 (1986); Benson, *The Last Victim and Other Failures of the Public Law Experiment*, 9 *Harv. J.L. & Pub. Pol'y* 399, 400-12 (1986).

⁴⁰Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 *Law & Contemp. Probs.* 225, 245 (1984).

⁴¹Compare Note, *The Outmoded Concept of Private Prosecution*, 25 *Am. U.L. Rev.* 754 (1976), with Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 *Yale L.J.* 209 (1955). See also Gittler, *supra* note 48, at 150-63; Cardenas, *supra* note 39, at 372-84.

⁴²Decisions denying interested parties a role in criminal proceedings reflect descriptive, rather than normative, conclusions. For example, private parties, including victims, have been denied standing to compel enforcement of criminal statutes, but the lack of standing is generally related to the absence of any statute conferring a right to sue. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 *Yale L.J.* 488 (1988). See also *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (although standing to

(continued...)

Recent years have seen a dramatic trend toward greater formal involvement of victims in the criminal process. The Court's approach to victim participation in capital sentencing has, in the past, ignored society's desire to consider the suffering caused by the act of murder when determining an appropriate punishment. This is true even though the Court repeatedly has held that the decision of the capital sentencer is a moral one, reflecting the moral judgment of the community. *California v. Brown*, 479 U.S. 538, 545 (1987).

The moral judgment of the public is manifested in the laws enacted by its elected officials. Statutes are "first among the objective indicia" of public attitude. *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 2975 (1989). Imposing the death penalty, after taking into account the impact of the killer's act on the victim and the victim's family, is prohibited under the Eighth Amendment as cruel and unusual only if society has "set its face against" consideration of the victim at sentencing. *Id.* at 2979. In fact, the reverse is true, the national consensus, as reflected in the operative acts of the public, supports the sentencer's consideration of the injury to the victim. There is no rational or constitutional basis to eliminate the moral judgment of the community from the sentencing phase of a capital offender's trial.

The Court owes deference to the decisions of the state legislatures under our federal system. *Gregg*, 428 U.S., at 176. "Determinations of appropriate sentencing considerations are peculiarly questions of legislative policy." *Booth*, 482 U.S., at 515 (White, J., dissenting). Currently, forty-seven states legislatively authorize input

⁴³(...continued)

challenge nonprosecution was denied for lack of actual or threatened injury, "Congress may enact statutes creating legal rights, the invasion of which creates standing" *But see Young v. U.S. ex rel Vuitton et Fils*, 107 S. Ct. 2124, 2141 (1987) (Blackmun, J., concurring).

by the victim at sentencing.⁴³ In a survey of states, 63 percent were found to require victim impact information on the seriousness of the physical injury. Fifty-three percent require information on emotional or psychological injury. In 25 percent of the states, the victim is asked to tell the court his or her opinion about the offender, while 72 percent permit such an opinion but do not require it. Finally, in 26 percent of the states, the victim is asked to specify a sentence recommendation.⁴⁴ Under *Booth*, all of this legislation is invalid in capital cases.

B. Victim Participation Serves Important Social Purposes.

We have previously presented our view that the Constitution does not require all criminal punishments to be justified on utilitarian grounds. See *supra* part I.D. However, from a purely utilitarian perspective, victim participation in the criminal process serves a number of important purposes. This analysis supports our view that *Booth* and *Gathers* were wrong in excluding victim impact evidence in capital cases.

1. Victim Involvement in the System Discourages Vigilantism.

Justice Stewart's concurring opinion in *Furman* contains the following observation: "When people begin to believe that organized society is unwilling or unable to

⁴³A listing of these statutes is included in the Appendix to this brief.

⁴⁴McLeod, *An Examination of the Victim's Role at Sentencing: Results of a Survey of Probation Administrators*, 71 JUDICATURE 162 (1987); ABA Guidelines to Fair Treatment of Victims and Witnesses in the Criminal Justice System 18 (1983); Note, *VIS: Reform or Reprisal*, 27 Am. Crim. L. Rev. 391 (1989).

impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law." 408 U.S., at 308. These concerns are not fanciful.

The victim's rights movement has gained strength in recent years, indicating widespread unrest among victims with the current criminal justice process.⁴⁵ The public often allies itself with citizens who "take the law into their own hands" in response to the inability of the criminal justice system to recognize society's rights and needs.⁴⁶ All of these facts indicate that society is perhaps reaching the point at which the concept of justice held by the individual, and by the general public, is no longer satisfied by the law.

2. A Right of Victim Participation Encourages Cooperation with Police and Prosecutors.

When victims of crime perceive that the criminal justice system is not vindicating their interests, support for the criminal justice system, which is crucial to the apprehension and conviction of criminals, declines. "Indeed, the conclusion has become nearly inescapable: a criminal justice system that ignores the interests of or ill

⁴⁵Both on the national and local levels, organizations have sprung up across the country to address issues of concern to crime victims and to promote the rights of victims. See Carrington and Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 Pepperdine L. Rev. 1 (1984); National Organization for Victims' Assistance, *Victims' Rights and Service: A Legislative Directory* (1987).

⁴⁶The case of Bernard Goetz is instructive. Goetz initially received much public support for his actions. See N.Y. Times, Jan. 27, 1985, Sec. 4, at 20, col. 1 (discussing reasons for public support of Goetz).

treats the victim runs the risk of alienating the person upon whom its success as an institution depends."⁴⁷

Crime victims are the major initiators of the criminal process. Approximately eighty percent of crimes are made known to the police through reports of citizens, usually victims.⁴⁸ Yet, various statistics indicate that many crimes go unreported.⁴⁹ Among the reasons why victims opt not to report crimes is the fear that the system is powerless to help them and might further victimize them.⁵⁰ Similarly, crime victims often choose not to cooperate with prosecution of the offender, leading to dismissal of many cases.⁵¹ Non-cooperation is caused by both the administrative problem of lack of information, and by the systemic flaw of failing to take victims' views and interests into account.⁵²

⁴⁷Hudson, *The Crime Victim and The Criminal Justice System: Time for a Change*, 11 Pepperdine L. Rev. 23, 28 (1984).

⁴⁸Gittler, *supra* note 39, at 147.

⁴⁹Judge Mikva has noted that for every ten crimes committed, an estimated three or four are reported. This figure indicates a "pervading cynicism about the system's capacity to insure justice." Mikva, *Victimless Justice*, 71 J. Crim. L. & Criminology 189, 190 (1981). The Bureau of Justice Statistics, *U.S. Dep't of Justice Report to the Nation on Crime and Justice* (2d. ed., 1988), suggests that less than 50% of all violent crimes are ever reported.

⁵⁰Kidd & Cajet, *Why Victims Fail to Report? The Psychology of Criminal Victimization*, 40 J. Soc. Issues 34-50 (1984), cited in Kilpatrick & Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 21 (1987).

⁵¹Gittler, *supra* note 39, at 148. See also Hudson, *supra* note 47, at 30.

⁵²See Kelly *Victims' Perceptions of Criminal Justice*, 11 Pepperdine L. Rev. 15 (1984).

Since victims of crime have already suffered, physically and psychologically, it is not surprising that they choose to avoid involvement in the criminal process. Studies addressing victim involvement in the criminal process suggest that there is a high correlation between victims' satisfaction and their perceptions that they influenced the outcome or that the sentencing authority was sensitive to victim issues.⁵³ These studies confirm that a greater role for victims in the sentencing process may positively impact on the reporting and investigation of crime.

3. *Participation in the Criminal Justice System Helps to Remedy the Traumatic Effects of Crime on the Victim.*

Victimization carries with it profound psychological consequences, both immediate and long term, and it is often this psychological injury that has the greatest impact on the victim.⁵⁴ In addition to crime-related stress caused by feelings of inequity, loss of security, perceived greater vulnerability, and perception of being deviant, crime victims are psychologically affected by the lack of any role in the criminal process. The victim quickly learns that the system's resources "are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."⁵⁵ This realization, combined with the long duration of the capital criminal process, results in a feeling of loss of identity

⁵³Kilpatrick & Otto, *supra* note 50, at 23-24 (citing J. Herndon & B. Forst, *The Criminal Justice Response to Victim Harm* (1984)).

⁵⁴Task Force on the Victims of Crime and Violence, *Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psych. 107 (1985).

⁵⁵*Id.* at 109.

and additional emotional and psychological stress for the victim.⁵⁶ Permitting crime victims to participate in the proceedings can eliminate or reduce the potential for further psychological harm by reducing their perception of inequity or helplessness.⁵⁷ In particular, participation at the sentencing phase can be a cathartic experience for the victim, which helps bring an end to the psychological suffering that follows victimization.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Tennessee should be affirmed, and this Court's decisions in *Booth* and *Gathers* should be overruled.

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⁵⁶*Id.*; Gibbons, *Victim Again: Survivors Suffer Through Capital Appeals*, 74 A.B.A.J. 64 (Sept. 1988).

⁵⁷Kilpatrick and Otto, *supra* note 50, at 19.

APPENDIX

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting victims' rights and criminal justice reform. In 1981, WLF published a "Crime Victims Impact Statement" manual to serve as a model guide for implementation at the state level of the use of victim impact information. WLF works with other victim rights groups, including the *amici* in this case. WLF has appeared before this court as *amicus curiae* in a number of cases dealing with victim rights issues, including *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Ohio v. Huertas*, *cert. dismissed as improvidently granted*, 111 S. Ct. 805 (1991). WLF argued in *Gathers* and *Huertas*, as it does in this brief, that the Court should overrule *Booth v. Maryland*, 483 U.S. 496 (1987).

Families & Friends of Missing Persons & Violent Crime Victims is a nonprofit organization providing assistance, support, and information to the thousands of victims each year throughout the State of Washington. The organization was formed in 1975 following the tragic disappearances and deaths of several Seattle area girls. Families & Friends works with victims, the community, law enforcement officials, correction and criminal justice personnel, and the media to promote understanding of the physical and emotional trauma of victimization.

The National Victim Center (formerly The Sunny von Bulow National Victim Advocacy Center) is a national, nonprofit organization based in Forth Worth, Texas. The Center's purposes are to promote responsiveness of the criminal justice system to the rights and needs of the victims of violent crime, as well as to increase public

awareness concerning the plight of crime victims through educational programs, conferences, and publications.

Parents of Murdered Children (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national nonprofit, self-help support organization based in Cincinnati, Ohio with chapters nationwide. Besides providing support for grieving parents and family members, POMC provides information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family. POMC has appeared, along with WLF, as an *amicus* in several cases, including *South Carolina v. Gathers*, *supra*, and *Ohio v. Huertas*, *supra*.

People Against Child Abuse, Inc. (PACA) is the Maryland chapter of the National Committee for the Prevention of Child Abuse. Founded in 1984, PACA has 40,000 members and supporters statewide. PACA conducts educational programs for both adults and children and provides legal and material help to victims of child abuse. PACA recently appeared before this Court as an *amicus* in *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

The Stephanie Roper Committee, Inc. is a nonprofit organization based in Upper Marlboro, Maryland, which was founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Committee is a victim rights advocacy organization which has proposed legislation responsive to the needs of victims. One such proposal enacted into law was the Victim Impact Statement Law, which was the subject of the challenge in *Booth v. Maryland*, *supra*, in which the Committee also appeared as an *amicus*.

VICTIM IMPACT LEGISLATION

Alaska-Alaska Stat. 12.55.022 (1990)
 Arizona-A.R.S. 13-702F (1989)
 Arkansas-Ark. Stat. Ann. 5-65-109 (1987)
 Colorado-C.R.S. 16-11-102 (1991)
 Delaware-11 Del. C. 4331 (1990 Supp.)
 Florida-Flo. Stat. 921.143 (1985)
 California-Penal Code § 1191.1 (1991 Supp.)
 Georgia-O.C.G.A. 17-10-1.1 (1990)
 Idaho-Id. Code 19-5306 (Supp. 1990)
 Illinois-Ill. Rev. Stat. 38-1406 (1990 Supp.)
 Indiana-Ind. Code Ann. 35-38-1-8.5 (1990)
 Iowa-Iowa Code 910A.5 (1989)
 Kansas-K.S.A. 8-1019 (1990 Supp.)
 Kentucky-Rev. Stat. Am. Title XXXVIII 421.520 (Supp. 1990)
 Massachusetts-Mass. Ann. Laws ch. 279, 4B (Supp. 1988)
 Louisiana-R.S. 46:1844(a) (Supp. 1990)
 Maryland-Md. Ann. Code. 27, 761 (Supp. 1990)
 Michigan-Mich. C.L. 780.763 (Supp. 1990)
 Mississippi-Miss. Code Ann. 99-19-151 to 161 (1990)
 Missouri-R.S. Mo. 595.203 (1989)
 Montana-Mont. Code Anno. 46-18-112 (1989)
 Minnesota-Minn. Stat. 611A.037 (Supp. 1991)
 Maine-Me. Rev. Stat. 17A-1257(2) (Supp. 1990)
 Nebraska-Rev. Stat. of Neb. 29-2261 (1989)
 Nevada-Nev. Rev. Stat. Ann. 176.015 (Supp. 1989)
 New Jersey-N.J.S.A. § 2(c):44-6.B (Supp. 1990)
 New Mexico-N.M. Stat. Ann. 31-24-5 (1990)
 New York-N.Y.C.L.S. Crim. Pro. Law 390.30(3B) (Supp. 1991)
 New Hampshire-N.H. Rev. Stat. Ann. 651:4-A (Supp. 1989)
 North Carolina-N.C. Gen. Stat. 15A-825 (1990)
 North Dakota-N.D. Cent. Code ch. 12.1-34-02.14 (Supp. 1989)

Ohio-O.R.C. Ann. 2947.051 (1991)
Oklahoma-Ok. Stat. Ann. Tit. 22 § 982 (1986)
Oregon-O.R.S. 144.790(3) (1989)
Pennsylvania-Penn. Cons. Stat. Ann. Title 71 § 180-9.3
(1990)
Rhode Island-R.I. Gen. Laws 12-28-3, 12-28-4-4.3 (1989)
South Carolina-S.C. Code Ann. 16-3-1550 (Supp. 1990)
South Dakota-S.D. Cod. Laws 23A-27-1.1 (1990)
Tennessee-Tenn. Code Ann. 40-38-103(2)(1990)
Texas-Code Crim. Pro. 56.03 (Supp. 1991)
Utah-Utah Code Ann. 64-13-20(e) (1990)
Virginia-Va. Code Ann. 19.2-299.1 (1990)
Vermont-Stat. Ann. title 13 § 7006(a) (Supp. 1990)
Washington-Rev. Code 7.69.030(12) (Supp. 1991)
West Virginia-Code 61-11A-3 (1989)
Wisconsin-Stat. Ann. § 950.04(2M) (Supp. 1990)
Wyoming-Wyo. Stat. 7-21-103 (1990)